(1)

91-658

No. _____

Supreme Court, U.S.
FILED
AUG 20 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DAVID MILTON GLENN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

Petition For A Writ Of Certiorari To
The Court Of Appeals Of Texas, Fifth District

PETITION FOR WRIT OF CERTIORARI

BRUCE ANTON
SBN 01274700
2902 Maple Avenue
Dallas, Texas 75201
(214) 871-1125
(214) 871-1972 fax

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the Petitioner's rights under the Fifth Amendment was violated by the admission at his bench trial of incriminating statements made by the Petitioner to arresting officers in the videotape room of the police station while Petitioner was being questioned about his arrest for driving while intoxicated and after Petitioner invoked his right to counsel.

LIST OF PARTIES

The parties to the proceedings in the Texas Court of Criminal Appeals:

David Milton Glenn
The State of Texas

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 4

ARGUMENT 4

CONCLUSION 6

APPENDIX A ..... App. 1

Opinion of the Texas Court of Appeals
Glenn v. State, No. 05-89-00826CR
October 5, 1990

APPENDIX B ..... App. 4

Motion for Rehearing
Filed October 22, 1990

APPENDIX C ..... App. 10

Order Overruling Motion for Rehearing
November 16, 1990

APPENDIX D ..... App. 11

Petition For Discretionary Review Refused

Opinion of Texas Court of Criminal Appeals
Glenn v. State, No. 1251-90
April 3, 1991

TABLE OF AUTHORITIES

Page

CASES:

Pennsylvania v. Muniz, 110 S.Ct. 2638 (1990) 4, 5

Ullmann v. United States, 350 L.Ed. 511 (1956) 5

CONSTITUTION:

United States, Amend. V 2

STATUTES:

Supreme Court Rule 10(b) 2

No. _____

In The

Supreme Court of the United States

October Term, 1991

DAVID MILTON GLENN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas, Fifth District

PETITION FOR WRIT OF CERTIORARI

David Milton Glenn, Petitioner, petitions for a writ of certiorari to review the judgment of the Texas Court of Appeals for the Fifth Supreme Judicial District affirming the Petitioner's conviction.

OPINIONS BELOW

The opinion of the Texas Court of Appeals, affirming the Petitioner's conviction on October 5, 1990, is not reported, and is reproduced in Appendix A, infra.

The Motion for Rehearing filed in the Court of Appeals of Texas on October 22, 1990 is reproduced in Appendix B, infra.

The opinion of the Texas Court of Appeals of Texas overruling the Motion for Rehearing on November 16, 1990 is reproduced in Appendix C, infra.

The opinion of the Texas Court of Criminal Appeals refusing Discretionary Review delivered on April 3, 1991 is not recorded at *Glenn v. State*, No. 1251-90.

JURISDICTION

The judgment of the Texas Court of Appeals became final on April 3, 1991, when the Court of Criminal Appeals refused the Petitioner's Motion for Rehearing filed following that court's refusal of the Petitioner's petition for discretionary review.

The jurisdiction of this Court is invoked under Supreme Court Rule 10(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "no person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

The Appellant was arrested for driving while intoxicated. At approximately 12:30 a.m. the Appellant was interviewed on videotape by the police. He immediately requested that the videotape be stopped and that he be allowed to consult counsel. This request was denied. The Appellant was read his rights and his statutory obligation to take a breath or blood test. His property was inventoried. Thereafter, the videotape concluded. On the videotape audible response to commands made by the interviewing officer were made by the Appellant.

On the tape, the Appellant invoked his right to counsel. The admissibility of the audio portion of the tape then became a hotly contested issue at trial. (RII-152). Eventually, the entire tape (less ten seconds) was admitted (RII-43).

The Court did state that the audio portion of the tape entered into its findings of guilt. (RII-152). (See lines 7 through 17).

MR. SHAPIRO (defense attorney): Judge, could the Court – would the Court give us any insight as to why you found him guilty? I know that's not necessarily typical, but what factors the Court determined – in determining his guilt.

THE COURT: The videotape was a contributing factor for your information, sir.

MR. SHAPIRO: The audio, as well as the video portion?

THE COURT: Yes, sir.

How the issue was raised in the state courts

The Petitioner objected to the introduction of the audio portion of the tape at trial, complaining that he had invoked his right to counsel. The trial court denied the objection, except as to 10 seconds of the tape where the Petitioner stated that he wanted counsel.

The objection was urged on rehearing after the appeal had been affirmed.

The rehearing was denied, as was a request for discretionary review by the Court of Criminal Appeals.

REASONS FOR GRANTING THE WRIT

This case represents a Fifth Amendment issue substantially similar to that decided in *Pennsylvania v. Muniz*, 110 S.Ct. 2638 (1990).

ARGUMENT

The Petitioner, while being videotaped, repeatedly invoked his right to counsel. Nonetheless, he was asked to give background information and to submit to an inventory search of his person on tape. The manner in which the Petitioner responded to requests for verbal response, and physical acts (such as emptying his pockets) was the basis of the prosecution's closing summation.

MR. GOELLER (Prosecutor): We get at the jail, Judge, you looked at the video and you saw it when he was

standing there and he turned with his hands in his pockets and you saw this kind of movement right here (indicating) and you saw a lawyer, a lawyer knows not to get in there and act that way and you heard the way he was talking in there versus the way he talked on that witness stand and there is a world of difference, Judge.

He gets in there and he doesn't even know he dropped the coin, indication of loss of mental faculties, and the officer had to point down there and said put that down in there too. He won't recite the property card, Judge, what does that indicate? And you notice little things, my tie is in my shirt pocket, right, I mean my breast pocket, he wants to keep his chapstick.

Notice he asks the same question again, he asks the same question twice, will you preserve a sample of my breath, no, that's not possible. And he goes into exactly the same question again and the same thing with my chapstick, no, can I keep my chapstick, he keeps repeating himself. He stumbles over his words, he won't put his property in the box, his words were do it yourself."

As this Court noted in *Muniz* (at 2668):

We need not explore the outer boundaries of what is "testimonial" today, for our decision flows from the concept's core meaning. Because the privilege was designed primarily to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality," *Ullmann v. United States*, 350 L.Ed. 511 (1956), it is evident that a suspect is "compelled least whenever he must face the modern day analog of the historic trilemma – either during a criminal trial where a sworn witness faces

the identical three choices, or during custodial interrogation where, as we explained in *Miranda*, the choices are analogous and hence raise similar concerns. Whatever else it may include, therefore, the definition of "testimonial" evidence articulated in Doe must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the "cruel trilemma." This conclusion is consistent with our recognition in Doe that "[t]he vast majority of verbal statements thus will be testimonial" because [t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts." 487 U.S., at 213, 108 S.Ct., at 2349. Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the "trilemma" of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component.

CONCLUSION

A writ of certiorari should be granted in this case to allow for the resolution, on the merits, of the federal constitutional issue not discussed by the state appellate courts, and to apply to this case the well-settled decisions of this Court upon which the Petitioner relies.

Respectfully submitted,

BRUCE ANTON
2902 Maple Avenue
Dallas, Texas 75201
(214) 871-1125
(214) 871-1972 fax

Counsel for Petitioner

APPENDIX A

AFFIRMED and Opinion Filed October 5, 1990.

[SEAL]
(THE STATE OF TEXAS)

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-89-00826-CR

DAVID MILTON GLENN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 3
Collin County, Texas
Trial Court Cause No. 3-522-88

OPINION

Before Chief Justice Enoch and
Justices Baker and Kinkeade
Opinion By Justice Kinkeade

David Milton Glenn appeals his misdemeanor conviction for the offense of driving while intoxicated (DWI). After a bench trial, the court assessed punishment at sixty days' confinement, probated for two years, and a $500.00 fine. In Glenn's sole point of error, he argues that the record fails to reflect that he waived a jury trial. Because

the record does reflect that Glen waived a jury trial, we affirm the judgment of the trial court.

In a misdemeanor case, a written waiver of a jury trial is not required. *Schultze v. State*, 626 S.W.2d 89, 89 (Tex. App. – Corpus Christi 1981, pet. ref'd). An oral waiver reflected in the trial record and the judgment is sufficient. *Gomez v. State*, 730 S.W.2d 144, 146 (Tex. App. – Corpus Christi 1987, pet. ref'd);

At trial, the following took place:

THE COURT: This is the State of Texas versus David Milton Glenn.

Sir, is that your name –

THE DEFENDANT: Yes, sir.

THE COURT: – Mr. Glenn?

Mr. Glenn, your attorney has just advised that you intend to give up the right to trial by jury, is that correct?

THE DEFENDANT: Yes sir.

THE COURT: Sir, you understand there is an available panel here for the trial of your case?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that if you give up the right to trial by jury that past this point you will be bound to this election and that whoever decides this – however this case is handled there won't be a jury in it; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Are you giving up this right knowingly and intelligently?

THE DEFENDANT: Yes, sir. You know I'm a lawyer.

THE COURT: Yes, sir. That was going to be my next question; you are an attorney?

THE DEFENDANT: Yes.

The judgment also reflects that Glenn waived a jury trial. Because both the record at trial and the judgment reflect that Glenn waived a jury trial, we overrule Glenn's point of error and affirm the trial court's judgment.

/s/ Ed Kinkeade
ED KINKEADE
JUSTICE

Do Not Publish
TEX. R. APP. P. 90

890826F.U05

APPENDIX B

ORAL ARGUMENT REQUESTED

NO. 05-89-00826-CR

IN THE

COURT OF APPEALS

FOR THE

FIFTH SUPREME JUDICIAL DISTRICT

OF TEXAS AT DALLAS

DAVID MILTON GLENN APPELLANT

V.

THE STATE OF TEXAS APPELLEE

ON APPEAL FROM

COUNTY COURT AT LAW NUMBER THREE

OF

COLLIN COUNTY, TEXAS

MOTION FOR REHEARING

DAVID MILTON GLENN

BRUCE ANTON
ATTORNEY FOR APPELLANT
DAVID MILTON GLENN

TBC 01274700
2902 Maple Avenue
Dallas, Texas 75201
(214) 871-1125

APPELLANT'S MOTION FOR REHEARING

COMES NOW, DAVID MILTON GLENN, Appellant in the above-entitled and numbered cause, and submits this Motion for Rehearing and requests the Court reconsider the opinion by Justice Kinkeade of October 5, 1990, and reverse and render a judgment in favor of Appellant.

POINT OF ERROR NUMBER ONE

The trial court erred in basing the verdict of guilty upon part of a video taped interview with Appellant which was admitted in violation of his constitutional rights to due process of law and effective assistance of counsel under the Fifth and Sixth Amendments of the United States Constitution and Article I §9 of the Texas Constitution.

RELEVANT FACTS

The Appellant was arrested for driving while intoxicated. At the police station, he was interviewed on videotape. On the tape, the Appellant invoked his right to counsel. The admissability of the audio portion of the tape then became a hotly contested issue at trial. (RII-34-41). Eventually, the entire tape (less ten seconds) was admitted (RII-43).

The Court did state that the audio portion of the tape entered into its findings of guilt. (RII-152). (See lines 7 through 17).

MR. GOELLER: No, your Honor.

MR. SHAPIRO: Judge, could the Court – would the Court give us any

insight as to why you found him guilty? I know that's not necessarily typical, but what factors the Court determined – in determining his guilt.

THE COURT: The videotape was a contributing factor for your information, sir.

MR. SHAPIRO: The audio, as well as the video portion?

THE COURT: Yes, sir.

THE TAPE'S CONTENTS

At approximately 12:30 a.m. the Appellant was interviewed on videotape. He immediately requested that the videotape be stopped and that he be allowed to consult counsel. This request was denied. The Appellant was read his rights and his statutory obligation to take a breath or blood test. His property was inventoried. Thereafter, the video tape concluded. On the videotape audible response to commands made by the interviewing officer were made by the Appellant.

ARGUMENT AND AUTHORITIES

Appellant submits that his Fifth Amendment due process rights and his right against self-incrimination and his Sixth Amendment right to effective assistance of counsel were violated by the videotape procedure. Appellant also asserts that these same rights under Tex.Const.Art. I §9 and §10 were violated. This contention has been adversely decided in *McCambridge v. State*, 778

S.W.706 (Tex.Crim.App. 1989) and *Miffleton v. State*, 777 S.W.2d 76 (Tex.Crim.App. 1989) and *Jones v. State*, ___ S.W.2d ___ (Tex.Crim.App.) (May 2, 1990). Appellant nonetheless argues that his non-testimonial privileges have been denied and urges the Court to reconsider its prior holdings. The evidence of Appellant's guilt should not come from his own lips.

JURISDICTION

This Court has the authority to consider issues raised on Motion for Rehearing in the interest of justice. See e.g. *Carter v. State*, 656 S.W.2d 468 (Tex.Crim.App. 1983).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Court will grant rehearing and render judgment in Appellant's favor.

Respectfully submitted,

/s/ B A

BRUCE ANTON
SB# 01274700
2902 Maple Avenue
Dallas, Texas 75201
(214) 871-1125

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion for Rehearing has been hand delivered and mailed, certified mail, return receipt requested to opposing counsel, District Attorney for Collin County, Texas on this the 19 day of October, 1990.

/s/ B A
BRUCE ANTON

Order issued July 25, 1990

[SEAL]
(THE STATE OF TEXAS)

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-89-00826-CR

DAVID MILTON GLENN, Appellant

V.

THE STATE OF TEXAS, Appellee

ORDER

BEFORE JUSTICES LAGARDE, BURNETT AND KINKEADE

Appellant's motion for leave to file supplemental brief is **DENIED**. The supplemental brief tendered to this Court on June 22, 1990 is **ORDERED** stricken.

Appellant's motion to correct record is **DENIED**.

/s/ Sue Lagarde
SUE LAGARDE
JUSTICE

APPENDIX C

Order issued November 16, 1990

[SEAL]
(THE STATE OF TEXAS)

In The

Court of Appeals

Fifth District of Texas at Dallas

No. 05-89-00826-CR

DAVID MILTON GLENN, Appellant

V.

THE STATE OF TEXAS, Appellee

ORDER

The Motion for Rehearing filed by appellant DAVID MILTON GLENN, on October 22, 1990, is hereby OVERRULED.

/s/ Ed Kinkeade
ED KINKEADE
JUSTICE

APPENDIX D

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

April 3, 1991
COA#: 05-89-00826-CR

[illegible] HAMILTON
STATE OF TEXAS

AUSTIN APR-3'91 U.S POSTAGE 0.19

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: BRUCE ANTON
2902 MAPLE AVE
DALLAS TX 75201

BEST AVAILABLE COPY